

Frequently Asked Questions (FAQ's) - Contractor Business Systems

As of October 13, 2011

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Accounting System

- Q. Does CAS non-compliance automatically mean their Accounting System is deficient?

Not necessarily. Compliance with CAS and GAAP is one of the systems criteria under the Accounting System clause. Not all CAS non-compliances result in a significant deficiency determination and system disapproval. The ACO will have to determine if the non-compliance is a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes.

Applicability of DFARS Clause 252.242-7005

- Q. Is it true that this clause only affects contracts that are fully CAS covered?

The released Interim Rule states "Covered contract means a contract that is subject to Cost Accounting Standards under 41 U.S.C. Chapter 15, as implemented in regulations found at 48 CFR 9903.201-1."

- Q. The "trigger" that was talked about on all subsequent slides during the presentation was that a contract greater than or equal to \$50M and contain the clause for the withhold requirement to kick in. If it is the case that the clause is only applicable to contracts that are fully CAS covered, then contracts to foreign contractors will not contain the clause, as they are only subject to CAS 401 and 402. (At least here in the U.K.)

CAS exemptions state that contracts/subcontracts executed and performed entirely outside the U.S., its territories and its possessions are not subject to CAS. Contracts/subcontracts with foreign governments, their agents, or instrumentalities are also except from CAS (the exception does not extend to contracts/subcontracts with foreign concerns which is subject to CAS 401/402). 48 CFR 9903.201-1(a) states, "A CAS-covered contract may be subject to full, modified or other types of CAS coverage." This is a question that should be addressed by the Office of General Counsel. However, if the relevant clauses are in the contract, the ACO should enforce them.

- Q. For IDIQ contracts, the withhold would only be taken if the individual order was over \$50M, CAS covered and included both clauses, correct?

Correct, unless the contractor doesn't have a contract (or order) with a total contract value equal to or greater than \$50M. In that case, if the CO determines it is necessary to protect the Government's interest, the ACO may implement payment withholding on contracts (orders) valued at less than \$50M, containing DFARS Clause 252.242-7005 and the applicable business systems clause.

CACO/DACO/ACO Network

- Q. According to Tab A to the Contractor Business Systems Guidance (#11-364) issued on September 21, 2011, "when a CACO/DACO/ACO network exists, the CO responsible for making the final determination shall obtain all network CO's concurrence prior to notifying the contractor of the final determination. Obtaining all CO's concurrence within

the network will ensure consistent treatment of like Contractor business system issues throughout a company." Does this mean that the DACO for a Business Unit needs to come to me as the CACO, as well as the other Business Unit DACOS, for concurrence prior to notifying the contractor of the final determination? One of my DACOs might have twelve (12) facilities that fall within that Business Unit. These facilities are spread throughout the country. The property management reviews at various facilities are done periodically. The Business System Review process could be a lengthy, complex process if CACO/DACO/ACO review panels are involved.

Yes, the other ACOs/DACOs will be coming to you as the CACO and other DACOs to obtain the "network view." Obtaining concurrence of the CACO/DACO/ACO network ensures consistent treatment of similar issues throughout the company. For example, an ACO may find significant deficiencies in a certain business segment and when they run their draft final determination through the network, they may realize that the CACO or DACO over another business segment(s) treated the issue differently. Those differences would need to be discussed and, if necessary, the final determination may need to be adjusted to ensure like treatment of the issue.

The CACO/DACO/ACO network is not considered to be a "review panel" – but rather an avenue of communication. The intent of obtaining concurrence was to cover situations in which an ACO is making a decision, and a DACO and perhaps CACO are in place for that corporation (and may know of similar issues in other physical areas throughout the company). In order to drive consistency across the network, we are expecting vertical communication through that network, i.e. ACO to DACO to CACO. This way, the DACO and CACO (from a top-down view), would have insight as to what issues the ACOs under them are facing and what decisions are being made. The DACO/CACO should have the network view, rather than the individual ACOs having to go laterally across the network.

Canceling Funds

- Q. Cancelling Funds - What process do we follow when the funds on a contract to which we are applying a withhold are about to cancel?

The ACO, if appropriate, may release previously withheld amounts on contracts that have funds scheduled to cancel at the end of the fiscal year. If the CO believes the Government's interest is a risk, a payment withhold may be applied to other contracts with relevant clauses. The CO must notify the contractor that withholds will be applied on other contracts with the relevant clauses to protect the Government's interests.

Closeout

- Q. If there is currently a withhold in place and the contract is preparing to close, do we close the contract and release the withhold?

If a contract is physically complete and all necessary closeout actions are complete, the ACO may release the withhold. The ACO should determine if it is necessary to implement withholds on other contracts with the relevant clauses to protect the

Government's interests. Withholds may not be "transferred" between contracts. When the ACO determines it is in the best interest of the Government to release the withhold in order to proceed with contract closeout, and a CACO/DACO network exists, the ACO shall coordinate actions with the CACO/DACO prior to releasing payment withholds or implementing a payment withhold on other contracts with relevant clauses. The CO shall notify the Contractor of any changes in payment withholding as a result of contract closeout actions.

Contract Audit Follow-Up (CAFU)

Q. Do we still report this information in CAFU?

The rules for reportable audits have not changed in DoDI 7640.02 or in the DCMA CAFU Instruction. Reportable audits must continue to be tracked in the CAFU eTool until they are dispositioned.

Corrective Action Plan (CAP)

Determinations (Initial or Final)

Q. Are we required to issue an "Approval Letter" for the systems when there are no significant deficiencies found?

DFARS business systems policy requires the CO to determine the acceptability of the business system in accordance with contractual requirements and approve or disapprove the business system. The determination must be issued in writing to the Contractor.

Q. What is the DACO/CACO/ACO avenue if we have no audit report, no system audit, but we know there is an issue? (example-CAS issue or system deficiency)

Solid evidence is needed for the CO to make a determination that there are one or more significant deficiencies and disapproves a business system and ultimately implement a payment withhold. If the CO has sufficient information they can make an initial determination and begin the process. Asking for an audit or a functional specialist report will help support the CO's decision.

DCAA Audit Reports

Q. Could DCAA be asked to issue a Qualified Audit Report?

The CO can ask DCAA for a qualified audit report if that fits the CO's need. However, DCAA must decide whether to comply with the CO's request or not.

Earned Value Management System

Q. How does the EVMOD (Earned Value Management Operations Directorate) play into this new rule?

The Earned Value Management Implementation Division (DCMAO-EV) under the DCMA Operations Directorate (DCMAO) will conduct reviews of the contractors' earned valued management systems and serve as functional specialists submitting reports to the COs for determining the acceptability of the systems in accordance with contractual criteria.

International - Host Nation Audits

- Q. How will DCMA International handle this rule implementation? Use other sources – other than DCAA.

DCMA International may use Host Nation audits to help determine if there are significant deficiencies in any of the six Contractor Business Systems. In requesting these audits, the DCMA ACO may need to point out the systems criteria (and the definition of Significant Deficiencies) in the new clauses.

Legacy Final Determination and Legacy Reports

- Q. If we recently received an Accounting System Audit that did not take into consideration the 18 system criteria as required in the new DFARs Clause, do we need to have DCAA re-do the audit?

This type of report is considered to be a "Legacy" report because it was issued based on terms and conditions of business system clauses dated prior to May 18, 2011. The CO should follow DCMA's guidance for legacy final determinations and reports. The CO must consult with the auditor and initiate a follow-up review of the system in accordance with system criteria identified in the applicable business system clause. Previous findings in a legacy report may or may not be considered to be significant deficiencies under the terms and conditions of the applicable business system clause. DCAA should be able to help the CO understand how audit findings relate to the new systems criteria.

- Q. Many of the Business Systems have not been reviewed/audited in 3-4 years maybe even longer – what do we do in this instance? How is it assessed?

The ACO needs solid evidence of a significant deficiency traceable to one or more of the systems criteria in order to implement a Business System withhold. The CO cannot identify significant deficiencies for a system that has not been evaluated in accordance with current business systems clauses. Therefore, the CO should request a follow-up review.

- Q. For a period of time, we will have contracts under the old business system rules and contracts under the new business systems rules. I expect that DCAA will audit to the new business systems rule. What do we do with contracts under the old business systems rules when all systems are old (beyond 4 years therefore considered unassessed) and we have no current audit reports?

During this period of transition, DCAA will be auditing to the new rules. The major item will be that withholds will only be applicable to contracts with the clause and identification of significant deficiencies under new clause criteria. For systems that have not been reviewed for years, the CO should request audits.

Legal

- Q. Should we be consulting with the Office of General Counsel to review these determinations prior to release?

Consulting with the Office of General Counsel is always a good idea, especially if there is any possibility that the Contractor will submit a claim or appeal the CO's final determination.

- Q. Are these withholds subject to the Disputes Clause?

A CO's final determination to disapprove a business system and apply a payment withhold under the Business Systems provisions is not considered a Government claim subject to the Contract Disputes Act (CDA) and thus does not require issuing a Contracting Officer's Final Decision (COFD). A Contractor may disagree with the imposition of payment withholds and respond according to the procedure laid out in the Business Systems provisions, which would not be considered a dispute subject to the CDA. However, if a Contractor decides to make some type of claim against the Government resulting from the imposition of payment withholds and demands a COFD on its claim, this could be considered a dispute subject to the CDA and disputes clause of the contract. That would depend upon the position taken by the contracting officer in response to the contractor's claim. COs should seek the advice of local counsel for any contractor claims.

MOCAS Coding

- Q. For Contract receipt and Review, is MOCAS ready to accept the R9 remark "30" for contracts with the Business System Clause in it?

DCMA-AQ has submitted a MOCAS System Change Request and the MOCAS programmers are currently testing the change. We expect the codes (R9 Code 30 and Special Provision Code U) to be ready for CMO use in November 2011. A DCMA Memorandum will be issued announcing when CMOs may use the new codes.

Payment Withhold

- Q. Will DCMA always/only be the Contracting Officer to implement a payment withhold? For example we do not perform contract administration on some contracts, but do provide system status to other COs outside of DCMA.

No. The CO responsible for determining the acceptability of the business system must provide a copy of their final determination to disapprove a business system to all ACOs responsible for administering contracts awarded to that specific Contractor, including ACOs in the Navy SUPSHIP and Army Corps of Engineers. The final determination to disapprove a business system must include a list of contracts against which a payment withhold will be applied. In order to create the list of contracts, the CO must coordinate with the ACOs who are actually assigned to the contracts for administration. The ACO performing contract administration is responsible for executing and tracking the business system payment withholds.

Q. Can we simultaneously apply a payment withhold AND also stop progress payments?

Yes. A payment withhold under the Contractor Business Systems clause (and one of the six DFARS system clauses) does not preclude the ACO from exercising other remedies available in contract clauses (e.g., reducing or suspending progress payments under the Progress Payments clause).

Q. Does the withhold apply to ONE particular contract only? How is this withhold applied?

A payment withhold may be applied to as many contracts as the ACO identifies. The DCMA Instruction requires withholds only on contracts over \$50M with the relevant clauses. Where there are no contracts over \$50M with the relevant clauses or the CO determines payment withholding is necessary, the ACO (with Contracts Director approval) will implement a payment withhold on one or more contracts under \$50M with the relevant clauses.

Q. What happens when the Contractor delivers and the money is liquidated?

In this situation, there is no longer an opportunity for the contractor to receive interim financing. The contractor has recouped the full price of an FFP contract, and the ACO need not overtly release an earlier withhold of progress payments.

Q. What criteria do we use to reduce the withhold on a Business System from 5% to 2%?

If the contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the CO's intent to withhold payments and the CO, in consultation with the auditor or functional specialist, determines the Contractor is effectively implementing such plan, the ACO will reduce withholding concerning the significant deficiencies under the corrective action plan, to two percent.

Q. Performance Based Payments are based on *performance* not Business Systems; why are we including these type payments in the payment withhold as it relates to the new Interim Business Systems rule?

PBPs are included in the type payment withhold provisions of the Contractor Business Systems clauses. The clauses implement the 2011 NDAA.

Q. Reference the withhold on a progress payment, what should be reflected in the block on the "Progress Payment form "previous amount requested"?

The Contractor completes the "previous amount requested" block on a request for progress payments. The amount should reflect the sum of total progress payments approved by the ACO and paid to date. For contracts paid using the MOCAS system, MOCAS will validate previous amounts requested against that specific amount on the current request for progress payment.

Q. Hoping you can provide clarification on how withholds will be implemented on IDIQ contracts. I believe the withhold will be implemented on delivery orders that are equal to or greater than \$50M. The withhold could be implemented on delivery orders that are under \$50M where the ACO determines it is necessary to protect the Government and

gets approval from the CMO Contracts Director. Your assistance in clarifying how withholds will be implemented on IDIQ contracts would be much appreciated.

Withholding is applied at the order level for an IDIQ. DFARS clause 252.242-7005 requires the CO to withhold a percent of amounts due from progress payments and performance-based payments, and the Contractor must withhold a percent from its billings on interim cost vouchers on cost, labor-hour, and time and materials contracts. Since obligations and the specific types of payments occur at the order level, that is where the payment withhold must be applied. Also, the withholding limits are set against each payment -- not the contract (i.e., 5% for any single business system and 10% for multiple business systems).

- Q. If you have a disapproved business system and a new contract is issued including the DFARS clause, is a withhold on the incoming contract automatic?

A follow-up review of the business system would need to be conducted in order to determine if previous findings are current and considered to be significant deficiencies in light of the system criteria listed in the revised business system clauses. If the CO determines there are significant deficiencies, they would notify the contractor and request a response within 30 days. The CO would then review the contractor's response in consultation with the functional specialist or auditor and make a determination to approve or disapprove the system. If the system is disapproved, then the CO would implement a payment withhold on those contracts that contain DFARS 252.242-7005 and the associated business system clause and the dollar value is greater than or equal to \$50M.

- Q. If you have a disapproved business system and a withhold on a contract including the DFARS clause and a new contract is issued including the DFARS clause, is a similar withhold on the disapproved business system automatic for the second contract?

Yes, as long as the contract contains DFARS 252.242-7005 and the associated business system clause and the dollar value is greater than or equal to \$50M.

- Q. If contract "completes" and significant deficiencies still exist on contract what happens to the withhold on that contract?

If a contract is physically complete and all necessary closeout actions are complete, the ACO may release the withhold. The ACO should determine if it is necessary to implement withholds on other contracts with the relevant clauses to protect the Government's interests. Withholds may not be "transferred" between contracts. When the ACO determines it is in the best interest of the Government to release the withhold in order to proceed with contract closeout, and a CACO/DACO network exists, the ACO shall coordinate actions with the CACO/DACO prior to releasing payment withholds or implementing a payment withhold on other contracts with relevant clauses. The CO shall notify the Contractor of any changes in payment withholding as a result of contract closeout actions.

- Q. Can we modify the withhold tracking spreadsheet?

Yes -- as long as you are adding and not deleting information. The spreadsheet was created with the thought that higher management will request data regarding payment withholds for business systems. The spreadsheet includes minimum information that would be reported.

- Q. Can there be an additional spreadsheet to show how withholds can be identified by ACRN?

If the CO wants to track at that level, yes, please feel free to add ACRN level tracking. However, HQ does not intend to provide a spreadsheet for that level tracking.

- Q. How do we keep an audit trail of the payments and system approval information? As we went through the scenario and we changed withholds from 2% to 5%, there was no way to capture this information, except for the Notes field. Will there be a way to keep this history in the spreadsheet or are we to use the Notes field?

The Business Systems Status document (which must be uploaded in CBAR) will provide an audit trail. CAFU is also another source. CO's should feel free to use the Notes field as they see fit. The spreadsheet is designed to capture the current % withheld, as well as total amounts withheld regardless of the fluctuation in % -- as management will only be concerned with the current % being withheld against the contract, total withheld amount, and released amount -- per business system.

PLAS

- Q. Will a new PLAS code be developed for performing Accounting System reviews? Currently there is no such PLAS code.

Not at this time. We will explore the idea of establishing a PLAS code for Accounting Systems or for Contractor Business Systems. In the meantime, PLAS Code 052 – Contract Audit Follow-Up will be used for tasks accomplished for Accounting Systems.

Property Management System

- Q. As ACO I have never approved a Property System before – am I to assume with this rule, the ACOs will be approving the Property Systems?

The new Contractor Property Management System Administration clause specifically provides for the CO to approve the system if there are no remaining significant deficiencies.

- Q. Does the Government Property Limitation Clause still apply along with this new rule? Isn't this a double withhold to the contractor?

The Contractor Business System interim rule made no changes to any of the limitation clauses. The contracting officer has the right to take other actions within the terms and conditions of the contract. We do not consider implementation of payment withholds under DFARS Clause 252.242-7005 to be a double withhold.

Purchasing System

- Q. Currently the CPSR DFARS Clause states that only a certain POC within the CPSR team can approve the system NOT the ACO.

Per DFARS 244.305-70, the CO in consultation with the purchasing system analyst or auditor shall determine the acceptability of the contractor's purchasing system and approve or disapprove the system.

Review/Approval Process

- Q. The training information presented states "With approval of the CMO Contracts Director". In the newly proposed organization structure, with the DACOs aligning under the CACOs, there will be no CMO Contracts Director to approve. Who will approve prior to release?

The Cost and Pricing Center has supervisors who are equivalent to CMO Contracts Directors and must provide the needed approval for CACO/DACO determinations.

Significant Deficiencies

- Q. During the training session, I was led to believe that it will be up to the Contracting Officer to determine whether or not deficiencies reported by DCAA constitute "significant deficiencies." However, some of the documentation I have been reading leads me to believe that DCAA will tell us what is or is not a significant deficiency. Please clarify!

DCAA will opine in their audit reports about what they consider to be significant deficiencies. The CO must carefully consider DCAA's position and should discuss it with them (and any other relevant specialist, including the General Counsel). However, the CO will make the final determination to disapprove a Contractor Business System and implement the payment withhold.

Timeframes for Completing Actions

- Q. The CO should issue a written initial determination within 10 days of receiving the report and then after receiving the Contractors response within 30 days issue the final determination. This is NOT realistic! Is there any relief from these time constraints? If 10 days and 30 days are mentioned, management will hold us to that requirement.

These timeframes are not mandatory and are not contained in the contract clauses. The word "should" is used to establish the stated timeframes.

- Q. Within 30 days of receiving the Contractors response, the CO should make a final determination. The 30 day timeframe for the CO will be difficult as it involves consultation with DCAA (this could be a big hurdle) in us not making the 30 days. What do we do?

ACOs should be proactive and schedule a meeting with the auditor or functional specialist shortly after receiving the contractor's response. Make sure DCAA or the functional specialist receives the contractor's response to review so that everyone is

prepared for the meeting. The issue of timeliness and needed consultation has been discussed with DCAA HQs. They are preparing their guidance and policy.

Training

Q. How will the training be rolled out to the CMOs? Will Brown Bag sessions be scheduled and if so, when? Who will the audience be?

DCMA-AQ will conduct training with CMO Contracts Directors, who in turn will train their contracting personnel. We will also be conducting Brown Bag sessions. The dates for the Brown Bag sessions have not been determined.